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In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, PETITIONERS

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INDEX

Page

Cases:

Alaska v. *Carter*, 12 E.R.C. 1486 3

City of Rochester v. *U.S. Postal Service*, 541 F. 2d 967 9

Committee for Nuclear Responsibility, Inc. v. *Seaborg*, 463 F. 2d 788, injunction denied, 404 U.S. 917 2

Environmental Defense Fund v. *TVA*, 468 F. 2d 1164 9

Kleppe v. *Sierra Club*, 427 U.S. 390 ..... 3, 5, 11

Minnesota Public Interest Research Group v. *Butz*, 358 F. Supp. 584, aff'd, 498 F. 2d 1314 10

San Francisco Tomorrow v. *Romney*, 472 F. 2d 1021 9

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 14

United States v. *American Trucking Ass'ns*, 310 U.S. 534 9

Virginians for Dulles v. *Volpe*, 541 F. 2d 442 11

Constitution, statutes and regulations:

United States Constitution:

Art. II, Sec. 2 3

Art. II, Sec. 3 3

Budget and Accounting Act, 1921, 31 U.S.C. 1 *et seq.*:

Section 201, 31 U.S.C. 11 ..... 3, 4

Section 201(a), 31 U.S.C. 11(a) 3

Page

Constituion, statutes and regulations—continued:

Section 207, 31 U.S.C. 16 ..... 2, 4

Section 216(a), 31 U.S.C. 24 2

National Environment Policy Act of 1969, 42 U.S.C. 4321 *et seq.*:

Section 102(2)(B), 42 U.S.C. 4332(2)(B) 14

Section 102(2)(C), 42 U.S.C. 4332(2)(C) ..... *passim*

Section 102(2)(C)(i), 42 U.S.C. 4332(2)(C)(i) 13

Section 102(2)(C)(iii), 42 U.S.C. 4332(2)(C)(iii) 13

Section 102(2)(C)(v), 42 U.S.C. 4332(2)(C)(v) 13

CEQ Regulations, 43 Fed. Reg. 55990 (1978) (to be codified in 40 C.F.R. Part 1500 *et seq.*):

Section 1502.5, 43 Fed. Reg. 55995 5

Section 1506.8(a), 43 Fed. Reg. 56001 5

Section 1508.17, 43 Fed. Reg. 56004 7

Miscellaneous:

43 Fed. Reg. 55989 (1978) 7, 9

OMB Bulletin No. 72-6 (Sept. 14, 1971) 7

Proto, The *Opinion Clause And Presidential Decision-Making*, 44 Missouri L. Rev. 185 (1979) 3

Page

Miscellaneous—continued:

S. Rep. No. 524, 66th Cong., 2d Sess. (1920) 12

S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) 11

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1. Respondents and the amici curiae contend that an agency makes a "proposal" within the meaning of Section 102(2)(C) of NEPA when it submits its annual budget request to OMB in September of each year. They suggest, however, that even though the agency's budget request is a "proposal" at the time it is submitted to OMB, the agency need not prepare and distribute an EIS on that proposal until the President has submitted the Budget to Congress in January of the following year (Resp. Br. 9-10, 60; Br. of National Wildlife Federation 20; Br. of Wilderness Society 26 n.20). This suggestion marks a significant departure from the judgment of the court of appeals, which requires that an EIS be prepared to accompany the budget request at the time it is sent by the agency to OMB. Respondents' concession undermines the court's conclusion that an agency budget request constitutes a "proposal" within the meaning of Section 102(2)(C),

and it provides no alternative ground for defending the decision below.

a. Respondents argue that an agency's funding request to OMB constitutes a "proposal" under Section 102(2)(C) because "[n]o further action by the agency is required after the submission of its request for budget approval and appropriations" to OMB (Resp. Br. 45). But even if the agency has "said its last word" in transmitting its budget request to OMB, that does not make its budget request a "proposal" under NEPA.[1] As we explain in our opening brief (Br. 29-31), Congress has located the authority to propose appropriations exclusively in the President and has precluded the agencies from submitting independent budget requests to Congress.[2] Since the agencies have no authority to submit appropriations proposals to Congress and indeed are prohibited by statute from doing so,[3] their budget requests to OMB constitute only a part of the "germination process" of the President's Budget and

[1]If it did, similar reasoning would apply to the "final" budget request by the Fish and Wildlife Service to the Secretary of the Interior, and so on for component units of the Fish and Wildlife Service.

[2]Congress has enacted exceptions to allow only three agencies to submit appropriations proposals to Congress (Br. 53 n.43).

[3]This incapacity distinguishes this case from the cases cited by respondents (Resp. Br. 48-50 & n.33), in which an agency was acting either by itself or in concert with another agency with respect to a proposal that the agency was competent to make. Where the agency has power to make a proposal, either for legislation or for major federal action, the fact that its proposal may be rejected by another agency or by the President does not make NEPA inapplicable to the proposal. See *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 791 (D.C. Cir.), injunction denied, 404 U.S. 917 (1971). Under the Budget and Accounting Act, however, the agencies are precluded from making appropriations proposals; instead, they are directed to assist the President (pursuant to such procedures as the President may establish, 31 U.S.C. 16, 24) in the preparation of the President's Budget.

are therefore not subject to the EIS requirement of Section 102(2)(C). *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976).[4] As the court concluded in *Alaska* v. *Carter*, 12 E.R.C. 1486, 1490-1491 (D. Alas. 1978), NEPA does not require an agency to prepare an EIS when, at the President's request, it provides information or advice in connection with the exercise of an authority that is vested by statute exclusively in the President.[5]

[4]Respondents' suggestion (Resp. Br. 21-22) that the President has only a "relatively minor" role in formulating the Budget is unsupported and startling. The Budget and Accounting Act assigns essentially complete authority over the preparation of the Budget to the President. 31 U.S.C. 11. See also Br. 23-27. What the President submits to Congress is not, as respondents would have it (*e.g.*, Resp. Br. 21, 45), the "combined" federal budget. It is the single, unitary federal Budget; as Section 201(a) of the Budget and Accounting Act provides (31 U.S.C. 11(a)), "[t]he President shall transmit to Congress * * * the Budget * * *."

[5]Respondents express assurance (Resp. Br. 63) that requiring preparation of an EIS at the time the agency budget request is transmitted to OMB will not interfere with the President's constitutional authority to submit proposals to Congress and to obtain the opinion of his officers (U.S. Const. Art. II, Secs. 2, 3), since in their view the requirement will increase, rather than restrict, the information available to the President. But such an EIS requirement would stand between the President and the prompt counsel of his officers. For example, on respondents' theory an EIS may be required not only for an agency's initial budget submission to OMB, but also for answers to presidential inquiries concerning significant alterations in the agency's funding request. In view of the very short time span in which the Budget is prepared, such a restriction would impede presidential participation in the preparation of the Budget. The President would be compelled either to accept the agency's initial view, or to depart from it without the benefit of additional guidance from the agency. The Constitution, however, provides without limitation that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. Art. II, Sec. 2. See *Alaska* v. *Carter*, *supra*, 12 E.R.C. at 1491. See generally Proto, *The Opinion Clause And Presidential Decision-Making*, 44 Missouri L. Rev. 185 (1979).

Respondents are wrong in stating (Resp. Br. 43) that, if we are correct, then "any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever it required a submission to Congress after legislative clearance through OMB." Respondents apparently assume that, after clearance from OMB, legislative proposals are submitted to Congress only by the President. On the contrary, as we noted in our opening brief (Br. 36, n.26), legislative proposals are ordinarily submitted to Congress, following clearance from OMB, by the interested agencies and not by the President.[6] Hence there is no danger that agency proposals for environmentally-significant legislation would be generally exempt from NEPA on the ground of presidential submission. There is no statute that prevents agencies from proposing legislation to Congress, as there is with respect to appropriation requests (31 U.S.C. 16). Nor is there any statute that centralizes the responsibility for proposing legislation in the President, as there is with respect to appropriations (31 U.S.C. 11). Thus agencies may and do submit legislative proposals to Congress, and when they do, they may be required to prepare an EIS in connection with those proposals (see our opening brief at 36 n.26). (Congress may, of course, refuse to act on a legislative proposal pending the preparation of an EIS if it believes that an EIS is appropriate or required.)

b. The court of appeals concluded that an agency makes a "proposal[ ] for legislation" within the meaning of Section 102(2)(C) at the time it submits its budget request to OMB, although the court limited its holding to budget requests that would "significantly change[ ] the status quo" or that

[6]Unlike the Budget, legislative proposals usually are not submitted to Congress by the President alone. In the typical case, even when the proposal is announced by the President, its actual submission is made by the interested agency.

reflect a "new look" at the agency's program. The court concluded that an EIS must be prepared "to accompany" such budget requests at the time they are transmitted to OMB (Pet. App. 2a; see *id.* at 14a, 17a, 18a, 22a). Respondents suggest (Resp. Br. 60), however, that an agency could satisfy its NEPA responsibility by transmitting an EIS on its budget request, not at the time it submits the request to OMB, but *after* the Budget has been submitted to Congress by the President.[7]

Respondents' suggestion is a significant withdrawal from the position of the court of appeals. It appears to constitute a recognition that there is no "proposal" that could invoke the EIS requirement until the time the Budget is transmitted to Congress by the President. See note 7, *supra*. It also appears to raise a question not before the Court. This case has never presented any question concerning what obligation agencies might have to prepare an EIS in connection with the President's submission of the Budget to Congress (see Br. 31 n.22). The question that has been litigated in this case—and that is presented for review in this Court (Pet. 2)—is whether agencies must prepare an EIS in connection with their

[7]Respondents cite (Resp. Br. 60) Section 1506.8(a) of the new CEQ regulations, which provides that an EIS is to be distributed in connection with a proposal for legislation within 30 days after the proposal is transmitted to Congress. 43 Fed. Reg. 56001 (1978). Although this section applies only to "proposals for legislation," respondents casually indicate that their suggestion "still could" apply whether budget requests are proposals for "legislation" or proposals for "major Federal action" (Resp. Br. 60). But Section 1502.5 of the new CEQ regulations provides that an EIS prepared in connection with a proposal for "major Federal action" is to be distributed in final form as part of the proposal. 43 Fed. Reg. 55995 (1978). Since respondents contend that an agency's budget submission *to OMB* may be a proposal for major federal action, the suggestion that the EIS may be deferred for several months thereafter is contrary to the regulations. See also *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406.

annual budget requests to OMB.[8] If respondents now concede that the EIS requirement is inapplicable at the time the agency submits its budget request to OMB, and applies only when the Budget is submitted by the President to Congress, they have abandoned the decision of the court of appeals and are raising here an issue not raised in the courts below.

It is difficult to follow respondents' suggestion in any event. Since it is the President, rather than the agency, who "proposes" the Budget to Congress, the head of the agency is not the "responsible official" who, under Section 102(2)(C), would be required to prepare an EIS at the time of the President's proposal. And since the President is not an "agency," and therefore is not subject to NEPA, the President also is not required to prepare an EIS in connection with the Budget (Br. 31-32 n.22). The President's submission of the Budget to Congress thus creates no NEPA responsibility for either the President or the agency.[9] Respondents' suggestion that an agency should prepare an EIS in connection with the President's Budget should therefore be rejected, even if it were properly presented in this case.

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[8]Respondents suggest (Resp. Br. 13-14 n.6) that even this question is no longer in the case, because the court of appeals reversed the judgment of the district court insofar as it required Interior to prepare an EIS in connection with every annual budget submission to OMB (Pet. App. 19a). But the decision of the court of appeals requires the Secretary of the Interior to prepare an EIS in connection with every budget request meeting the court's specifications. Moreover, the court of appeals expressly contemplated that OMB would be required to issue regulations directing federal agencies (including Interior) to prepare an EIS for such budget requests. Thus, the validity of the judgment below remains in genuine controversy for both petitioners. See Br. 22 n.15.

[9]Nor does this case raise any question of whether an agency must prepare an EIS if, subsequent to the President's submission of the Budget, the agency prepares a report or recommendation on the Budget or any part of it.

2. We argued in our opening brief (Br. 34-55) that, even if the agency's budget submission to OMB were a "proposal," it is not a "proposal for legislation" under NEPA. We noted that Congress has maintained a sharp distinction in its use of the words "legislation" and "appropriation," and does not use the former term to include the latter. To this respondents reply (Resp. Br. 34) that, "[i]n common parlance, the word 'legislation' is not a term of art," but refers to all enactments of Congress, including appropriations. In view of the deeply engrained distinction maintained by Congress in its usage of the terms "legislation" and "appropriation," however, it is apparent that in the "common parlance" of Congress an appropriation request is not a "proposal for legislation."[10] There is nothing in the history of NEPA to suggest that Congress intended to depart from its customary usage of the term "legislation" in enacting Section 102(2)(C) (see Br. 35-39).[11]

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[10]Respondents claim (Resp. Br. 30-31) that the recent CEQ regulation that provides that proposals for legislation do "not include requests for appropriations" (Section 1508.17, 43 Fed. Reg. 56004 (1978)) is entitled to no weight because, respondents assert, CEQ has not articulated the basis for its new position on this issue. In fact, CEQ explained the considerations that led it to adopt the new regulation and the reasons why it concluded "that preparation of EISs is ill-suited to the budget preparation process" (43 Fed. Reg. 55989 (1978)) (see Br. 42).

Despite respondents' claim (Resp. Br. 58 n.42), nothing in OMB Bulletin No. 72-6 (Sept. 14, 1971), expired June 30, 1972, ever provided to the contrary. This Bulletin required agencies to inform OMB as to (1) which "specific actions" the agency planned to take for which an EIS would be prepared, and (2) which agency actions would have a significant environmental effect. It did not require agencies to prepare an EIS in connection with any budget request. Nor do any regulations of the Department of the Interior require an EIS to be prepared in connection with budget requests (Pet. App. 47a-48a n.17).

[11]Respondents argue (Resp. Br. 35) that, since Congress has not amended NEPA or otherwise acted to reject the decision of the court of appeals, Congress must approve of the decision below as the proper

Respondents argue (Resp. Br. 38) that even if an appropriation is not "legislation," it is nonetheless a "major Federal action" and thus subject to the EIS requirement of Section 102(2)(C). They contend (Resp. Br. 39) that when a federal agency forwards "a request for budget approval to take an action significantly changing the status quo," the agency's budget request is a proposal for "major Federal action." They reason (Resp. Br. 40, 41) that since "[p]rojects of a localized nature have frequently been characterized as 'major Federal actions[,]' * * * appropriations of potentially nationwide scope should similarly qualify." Although this broad theory was adopted by the district court (Pet. App. 52a), the court of appeals declined to accept it.[12] The theory lacks merit and provides no basis for upholding the judgment of the court of appeals.

a. Respondents' attempt to analogize departmental budget requests to "[p]rojects of a localized nature" is unavailing. As we explained in our opening brief (Br. 45 n. 34), when a planned expenditure leads to some major implementing action—for example, the construction of a dam—an EIS will be prepared for that action. This is because the underlying project or action, and not the appropriation for it, constitutes major federal action. When Congress enacts an appropriations bill, it authorizes the establishment of an account from which funds may be expended; it is the expenditure of those funds on

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construction of the statute. This suggestion is frivolous. A far more significant indication of congressional intent exists in the fact that Congress, obviously aware that the President and the agencies have not submitted environmental impact statements with appropriations requests during the ten years since NEPA was enacted, has done nothing to impose such a requirement.

[12]The court of appeals noted (Pet. App. 15a-16a; footnote omitted) that "[t]he cases requiring an EIS in connection with appropriations requests involve proposals for construction or development of a project." As we discuss below, it is the underlying project decision, and not the appropriation request, that may constitute "major Federal action."

particular projects that, in some circumstances, will constitute major federal action.[13] CEQ noted in the preamble to its recent regulations that the fact that requests for appropriations themselves are not subject to NEPA under Section 102(2)(C) does not relieve "agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions." 43 Fed. Reg. 55989 (1978). Conversely, the fact that an underlying program decision may constitute major federal action is no basis for imposing an additional EIS requirement on the appropriations process.

b. Respondents' construction of the statute would yield "absurd or futile results." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The "major Federal action" provision of Section 102(2)(C) has been applied to projects as narrow in scope as the construction of a single post office (*City of Rochester* v. *U.S. Postal Service*, 541 F. 2d 967 (2d Cir. 1976)); the making of a loan to finance construction of a housing redevelopment project (*San Francisco Tomorrow* v. *Romney*, 472 F. 2d 1021 (9th Cir. 1973)); and the sale of timber on federally administered lands (*Minnesota Public Interest Research Group* v. *Butz*, 358 F. Supp. 584 (D. Minn. 1973),

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[13]In *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (6th Cir. 1972), the court of appeals concluded that an EIS should be prepared for a dam that had been begun, but not completed, before enactment of NEPA. The court concluded that "the continuing construction" (*id.* at 1180) was major federal action under Section 102(2)(C). The judgment in that case was not dependent on the court's additional conclusion that the appropriation request is a "proposal for legislation" (468 F. 2d at 1181). It is nonetheless noteworthy that the court did not conclude that the *appropriation* was itself "major Federal action," as respondents now contend. Instead, the major federal action was "the continuing construction of the project" (*id.* at 1180).

aff'd, 498 F. 2d 1314 (8th Cir. 1974) (en banc)). If a departmental budget request is "major action" because it is a "proposal" or "plan of action" (Br. of National Wildlife Federation 13) directed toward the accomplishment of underlying decisions that themselves involve "major Federal actions," it is apparent that *all* departmental budget requests would be subject to NEPA. The court of appeals correctly concluded with regard to a similarly broad claim—that every departmental budget request constitutes a "proposal for legislation"—that the statute should not be construed to reach such "ridiculous extremes" (Pet. App. 22a-23a; see *id.* at 17a). See also Br. 45-48.

Accordingly, respondents have offered numerous formulations to restrict application of their theory. They suggest that an agency's budget request constitutes "major Federal action" when it follows a "painstaking" or "intensive" review of the agency's program or when it would "significantly chang[e] the status quo" or result in a "major chang[e] in an agency's program" (Resp. Br. 39). They refer to such a budget request as a "programmatic change" (*ibid.*).[14]

Respondents' attempt to formulate a "limiting principle" (Pet. App. 15a, 16a) for its "major Federal action" analysis is no more supportable than the similar effort of the court of appeals in its discussion of "new look" budget requests as "proposals for legislation" (see *id.* at 16a-18a; Br. 53-55). If a budget request is a proposal for "major Federal action" simply because it seeks funding for a major underlying program decision, then it should not matter whether

[14]Elsewhere in their brief, respondents refer to such budget requests as "non-routine requests for budget approval" (Resp. Br. 60), and, on a single page (Resp. Br. 56), they describe such requests variously as involving a "painstaking review," a "considered review," a "programmatic review," or a "fundamental review" of an agency's program.

the underlying decision was the result of "intensive" or "painstaking" review. Similarly, if an underlying decision is made to accomplish some major federal action, it should not matter whether the budget request for that action constitutes a "major chang[e] in an agency's program" or a "programmatic change." To the extent that an EIS may be required in these situations, it would be required for the underlying program decision and not for the agency's budget request.[15] Thus, as with the similar "limiting principle" offered by the court of appeals, respondents' analysis is divorced from the language and history of the statute; it "would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation." *Kleppe* v. *Sierra Club, supra*, 427 U.S. at 406.[16]

[15]In suggesting that a budget request that follows "painstaking review of an ongoing program" and "significantly chang[es] the status quo" is a proposal for major federal action, respondents rely on a portion of the Senate Report on NEPA that refers to major actions as "project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs." S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969). But it is the "expansion or revision" of the program, and not the appropriation request, that may constitute the major action. This is illustrated by *Virginians for Dulles* v. *Volpe*, 541 F. 2d 442 (4th Cir. 1976), on which amicus Wilderness Society relies (Br. 15). In that case, the court found that a " 'major modernization' " of an airport to allow a "vastly expanded use" was a revision of an ongoing program that constituted major federal action under Section 102(2)(C) (541 F. 2d at 445). The court required an EIS to be prepared in connection with the expansion of operations at the airport; it did not hold or suggest that an EIS should be prepared in connection with the agency's request for appropriations.

[16]Moreover, as has been discussed above, only the President may propose the Budget. Thus, even if an appropriation constituted "major Federal action," there is no "proposal" for such action under NEPA until the President's Budget is submitted to Congress. See pages 1-6, *supra*.

3. Respondents claim (Resp. Br. 69) that the preparation and distribution of an EIS at the time an agency submits its budget request to OMB would not interfere with any necessary executive confidentiality or presidential discretion.[17] They claim (*id.* at 66) that NEPA disclosure would conflict only with an executive policy of confidentiality (OMB Circular A-10; see Br. 52-53) and that the statute, rather than the executive policy, must control.

This argument misperceives the nature of our original submission. We did not argue that NEPA is inapplicable to agency budget requests *because* its application would breach executive confidentiality. We contended that it is inconceivable that in enacting NEPA Congress intended—without ever so stating—to overturn the long-standing practice of confidentiality for Executive Branch discussions leading to the formulation of the President's Budget (Br. 50-53). We showed that the executive practice is not only long-standing, but is consistent with Congress's intent in the Budget and Accounting Act to centralize in the President the political responsibility for the formulation of the Budget (Br. 51-53; see *id.* at 24-25). By compelling a premature disclosure of "unrelated, and unrevised [estimates from individual agencies] representing the personal views and aspirations of bureau chiefs" (S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920)), the decision of the court of appeals construes NEPA to achieve a result at odds with the intent of Congress in enacting the Budget and Accounting Act. See our opening brief at 25.

[17]They argue, apparently in the alternative, that if the EIS need not be prepared until *after* the President submits the Budget, then there is no interference with executive confidentiality (*id.* at 62). But any question concerning the obligation of agencies to prepare an EIS in connection with the President's Budget after it is submitted to Congress is not properly presented in the case. See note 16, *supra*.

Respondents assert that a premature disclosure of individual agency budget requests would not seriously interfere with executive confidentiality because the EIS could focus "on various alternative ranges of funding" and on "some of the assumptions and factual information inherent in the request" (Resp. Br. 63). It is precisely the agency's choice of "alternative ranges of funding," as well as "the assumptions * * * inherent in the [agency's] request," that are treated as confidential under executive practice (see Br. 52-53). Moreover, the EIS requirement may well demand a more detailed elaboration of the agency's "proposal" than respondents have suggested. The statute requires, among other things, an analysis of the environmental impact "of the proposed action" (42 U.S.C. 4332(2)(C)(i)), of "alternatives to the proposed action" (42 U.S.C. 4332(2)(C)(iii)), and of "any irreversible * * *commitments of resources which would be involved in the proposed action should it be implemented" (42 U.S.C. 4332(2)(C)(v)). It is simply speculation on respondents' part that an EIS could be prepared to conform with these criteria without revealing the agency's advice to the President on its budget request. Finally, the custom of confidentiality is intended not only to protect the President's discretion to choose among alternatives that the agency has presented, but also to preserve his discretion to choose an alternative that the agency has *not* presented or even considered. Disclosure of the agency's independent analysis of what it regards as "reasonable" alternatives would undermine this objective of the budget process.[18]

[18]Respondents appear to acknowledge that their position on the applicability of NEPA would compel important if not fundamental changes in the nature of the budget process. They question "the political convenience of secretive budget processes" as those processes now exist (Resp. Br. 67), and they attempt to minimize the political and institutional impact of imposing "a three-to-four-month difference in timing" (*id.* at 68) upon an annual process. We continue to find it inconceivable that Congress in enacting NEPA intended to reshape the budget process in such important respects—whether or not Congress would have power to do so.

4. With regard to our contention that respondents lack standing under Section 102(2)(B) to seek an order directing OMB to promulgate regulations requiring federal agencies to do what (by hypothesis) the statute already requires them to do (Br. 59-61), respondents simply repeat their contention that OMB guidelines "would lead to the preparation of impact statements" (Resp. Br. 75). But the fact that, before the decision in this case, agencies did not prepare EISs for "new look" budget requests does not support a contention that, if the decision is affirmed in this Court, agencies will refuse to comply with the decision in the absence of OMB guidelines. Respondents' "unadorned speculation" does not provide standing under Section 102(2)(B). *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976); *id.* at 45 n.25.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

APRIL 1979

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*The Solicitor General is disqualified in this case.